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Monika Talwar

American University Washington College of Law

Thomas Quintana

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Training Judges to Incorporate International Law into Domestic Courts

by Monika Talwar and Tomás Ojea Quintana

General

From November 10–14, 1997, the Inter-American Development Bank (IDB) and the Washington College of Law (WCL) hosted approximately 45 judges, prosecutors, and public defenders from 18 different Central and Latin American countries for a training session. The training session was led by ten human rights experts from Latin America and the United States, as well as five professors from WCL. The aim of the project was to familiarize the participants with international law precepts. The program also trained them to incorporate international law, particularly inter-American human rights norms, into their domestic decisions.

The training project, through the impetus of WCL professors, was implemented by the Center for Human Rights and Humanitarian Law. The Center was involved due to its success with the Inter-American Human Rights Moot Court Competition, the Human Rights Digest project, and the publication of materials on human rights. Based on the Center's achievements, the IDB dedicated money to work with WCL in promoting judicial reform and strengthening respect for fundamental human rights. Many lending institutions have made forays into judicial reform, but without much success, due to a lack of accountability and a failure to provide impact assessments. In this case, accountability is assured because the IDB was closely involved in the organization of the training. In addition, an impact assessment is expressly provided for and will be one of the Center's priorities.

Training Goals

The IDB/WCL project falls within the framework of judicial reform and the strengthening of the administration of justice. The IDB/WCL project deals with fundamental rights closely related to the judiciary, such as the right to a judicial remedy, the right to due process, the right to a decision within a reasonable time, and the right to an impartial and independent court.

The project planners targeted appellate judges and judiciary members for several reasons. They make and affect judicial decisions on a daily basis and can have a strong influence on judges at lower levels. The organizers felt that these participants would be a better audience than supreme court judges because supreme courts tend to hear only a few, exceptional cases. Appellate judges, on the other hand, hear many more cases and have the potential to create binding decisions. A small number of supreme court judges, however, were targeted to con-



Justice Marcos Libedinsky (left), Chilean Supreme Court; Justice Stephen Breyer (center), U.S. Supreme Court; and Justice Hernando Herrera Vergara (right), of the Colombia Constitutional Court, during panel discussions on the independence of the judiciary.

template a judicial reform process that incorporates human rights.

The project aims to convince the participants that they can create international responsibility and consequences as a result of their domestic cases. The participating members have expressed an interest in learning more about the content of international law and how it can be applied domestically. They are uncertain as to the application of international law either directly or through federal legislation. Most importantly, the participants need to be made aware that their decisions can create international responsibility for their countries.

Training Program

The training schedule provided the participants with a familiarity of the most significant international instruments protecting fundamental rights. The training relied on a manual prepared by the Center for Human Rights and Humanitarian Law. The manual will be published after the session and will be made available on the Center's website. The trainers and experts guided the sessions, encouraging judges to express their opinions and raise issues. The training proceeded as follows:

Monday: This session explored the relationship between international law and domestic law. The purpose was to learn how to apply international law domestically. The training emphasized the ability of judges to directly apply treaties that have been ratified by their parliaments; likewise, stressing the ability of prosecutors and public defenders to invoke such treaties. The participants looked at the texts of such international law sources as the American Convention

on Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the decisions of the Inter-American Court and Commission. There was role-playing that allowed the participants to apply international law to cases they may deal with in their courts on a regular basis. The participants also had an opportunity to express their opinions and share their experiences.

Tuesday: The session focused on access to justice and judicial remedy. The same texts were examined and the participants looked specifically at rights relating to access to justice and judicial remedy.

continued on page 21

This project is unique from other judicial reform projects in many ways:

- The organizers of the training are from Latin American countries and have experience in Latin American courts. They know first-hand in which areas the participants need to be trained.
- Training through role-playing: The training was an interactive process so that trainees were able to work through typical cases. Moreover, the trainees had the opportunity to ask questions that the trainers incorporated into the training sessions.
- Use of trainers and experts from the continent as well as members of the Inter-American Court and the Commission.
- The high number of participant countries and the number of participants.
- The location of the training, Washington, D.C., which allowed experts, and governmental and NGO representatives to participate.

Superior Orders, continued from page 12

superior, breaking international law, in the process making himself individually liable for his actions; or he may disobey the orders of his superior, and thus possibly be prosecuted for breach of the domestic law of his country.

Scenario Analysis

A scenario such as the one described above is certain to occur, unless a provision similar to the one provided in this article is added to the current proposed statute of the ICC. It is equitable to say that if individuals are to be held to a standard which does not allow them to claim the superior orders defense, domestic provisions must exist to address the concerns of the individual. The forum created must legitimately allow for questions regarding whether a proposed course of action would breach international law. This domestic

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forum must shield the individual from being forced to commit acts that he believes violate international law.

The necessity of such a provision is not based solely on the question of fairness. One of the functions of the ICC would be to act as a deterrent. For the ICC to be an effective deterrent, it must make individuals fear punishment to a degree that will prevent illegal action. In the situation described above, the individual is faced with certain prosecution at the domestic level and probable prosecution at the international level. It

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is possible that the individual will consider following the order of a superior as the 'safer' option from a personal perspective. If there is an alternative available, such as the one suggested above,

the individual can follow his initial belief and avoid acting on the orders that would cause him to breach international law.

The issue of sovereign decision making, *vis-à-vis* the armed forces of a nation, will be raised as a barrier to such a proposal. However, many countries already have provisions in their domestic law addressing these issues. One such example is the U.S. law governing a soldier's right to refuse to obey an illegal order. The law in the United States is a unilateral attempt to address this vital issue. It has been recognized in the United States, especially in light of the facts surrounding *United States v. Calley*, that the subordinate must have the right to question orders. In *Calley*, a group of soldiers refused to follow Calley's orders in the massacre of villagers in the My Lai incident during the Vietnam War. Soldiers have a duty to question illegal orders and to refuse to obey them. The U.S. law in this area is an excellent example of a country beginning to address the need for protection for subordinates.

There is, admittedly, no guarantee that such a provision will ensure a state's compliance with the requirements outlined in an ICC treaty. There is the possibility, however, that the real-

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ization that the state is a signatory party will influence governmental policy and facilitate domestic legislation. Domestic legislation provides a needed counter-weight to the superior orders defense. A provision, such as the one under discussion, will allow individuals to avoid committing illegal acts while further solidifying the premise that a superior order does not legitimize illegal acts. ☉

* Rajeev Purohit graduated from the Washington College of Law, with an LL.M. in International Legal Studies in May 1997. He completed his LL.B. at the University of Sussex in 1995. He is presently working for the National Interreligious Service Board for Conscientious Objection (NISBCO) as the Director of Legal Services.

Training Judges, continued from page 16

The program sought to impress upon the participants that these rights are an international obligation. The participants also tried to formulate solutions to the most common stumbling blocks to judicial access and judicial remedy, namely a lack of resources and inefficiency.

Wednesday: The trainees were involved in examining due process rights such as the right to a lawyer, the right to present a defense, the right to cross-examination, the right to appeal, the right to liberty, and prisoners' rights. They examined international legal texts and engaged in more role-playing exercises.

Thursday: This session focused on economic, social, and cultural rights. For instance, the participants explored issues concerning women's rights and environmental rights. Human rights experts from the Americas presented the importance of these topics to the training members. An IDB panel also discussed the role of financial institutions in judicial reform. Also on Thursday, a panel of federal judges from North America and supreme court judges from Latin America discussed the independence of the judiciary.

Friday: This session focused almost exclusively on freedom of the press and freedom of information (which includes freedom of expression, assembly, religion, and the right to conscientious objection). Many Central and Latin American countries have been gradually adopting a standard of *real malicia* or "reckless disregard" to be proven in civil or criminal cases brought by public officials against journalists. Such a standard protects journalists because it requires more than a mere showing of negligence on the part of the journalist when publishing articles about public officials. The Inter-American Court and Commission have relied on this standard in their decisions and writings. The importance of *real malicia* will be impressed upon the participants, particularly on those from new democracies. The press has an important role to play because it sometimes acts in the place of the judiciary in exposing corruption. Freedom of press and information, moreover, have the highest stature of all international human rights provisions in the American Convention.

One exciting aspect of the project is the creation of a network that will provide judges with access to materials on international and fundamental human rights. The network, through the use of e-mail and the Internet, will enable judges to exchange judicial decisions. Most importantly, if the project is ultimately a success, it can easily be replicated in other parts of the world. ☉